Supreme Court, U. S.
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80-179

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

JAMES N. AUTRY, et al.,
Petitioner,

vs.

BARBARO FLORES and ALMA FLORES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

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The Petitioners James N. Autry, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 7, 1980.

QUESTIONS PRESENTED

1. Do the elected representatives of a city have the right to a jury instruction embodying qualified immunity when monetary damages are sought under 42 U.S.C. Section 1983 for an official action?

2. Does the protest of a liquor license by a public officer which necessitates a hearing before an independent administrative body admittably affording due process constitute the deprivation of liberty properly cognizable under 42 U.S.C. Section 1983?

PARTIES INVOLVED

The parties on whose behalf the petition is filed are James N. Autry, chief of police, Warren Butler, mayor and city councilman, Kenneth M. Hiverly, city councilman, Peter Holtzen, city councilman, C. W. Smith, city councilman, and Clarence Thom, city councilman, all of the City of Calistoga.

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JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 7, 1980. A petition for rehearing was not filed. This petition for certiorari was filed within 90 days of said judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES, REGULATIONS AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional Provisions, statutes and regulations involved are 42 U.S.C. § 1983, California Constitution, Amendment XX, Section 22, California Business and Pro-

fessions Code Section 23000, et seq., all set forth in full text in the Appendix attached hereto.

STATEMENT OF THE CASE

Respondents applied for a liquor license in August of 1974. The license application was for a proposed restaurant within Calistoga, a city of 2,200 people located in Northern California. The application was directed to the California Department of Alcoholic Beverage Control (hereinafter "ABC"). The ABC has exclusive authority and jurisdiction within the state to investigate, grant or deny liquor licenses. California Constitution, Article XX, Section 22; California Business and Professions Code Section 23000, et seq. Any person or entity may protest an application. California Business and Professions Code Section 24013 and 24014. The ABC must investigate every application and hold a hearing upon the application's denial if requested by the applicant. California Business and Professions Code Sections 23958; 24011; 24012. A protest by a public entity, however, makes a hearing required whether or not the application is denied. California Business and Professions Code Section 23988.

As part of the initial processing for respondents' application, notification was given to the Calistoga Police Chief, petitioner Autry. After receiving notice of the application Autry talked to sheriff's deputies of the adjacent county, Napa. They advised Autry that respondents had a bar named Mexicali Rose in Yountville, a city twenty miles from Calistoga, and that it was considered by the Napa County Sheriff's office to be a source of problems. Autry learned that there had been numerous complaints in Yount-

ville relating to disturbing the peace emanating from the Mexicali Rose premises; these included fighting, a shooting incident and other disturbing the peace complaints. Based upon this information Chief Autry filed a protest of the application with the ABC.

After investigating and filing his initial letter of protest, Autry appeared before a duly convened Calistoga City Council meeting and presented the information that he had obtained. He expressed concern that there was a sufficient number of licensed premises in Calistoga (the majority of which were within a two-block area of respondents' premises) and that the addition of another license could well result in law enforcement problems within the city. Present at this meeting were the petitioners (city councilmen) and City Attorney York, in his official capacity to advise the city council in legal matters relating to city business. Prior to this meeting Councilmen Butler and Holtzen, petitioners herein, had also obtained information from sheriff's deputies and townspeople pertaining to the problems at the Mexicali Rose premises in Yountville. A vote to protest respondents' license application was made and City Attorney York was directed to draft correspondence to the ABC protesting the issuance of the license. This correspondence was sent under the signatures of Autry and Bishop on behalf of the Calistoga City Council.

Following the letters of protest submitted by petitioners, the ABC conducted an investigation wholly independent of the city's as to whether the application should be granted. The ABC had complete jurisdiction over the investigation

and granting or denial of the license. The investigation was directed by Stanley Pierce, District Director of the ABC. Scurachio was the ABC investigator assigned to do the field work. His directions in regard to the investigation were to obtain information and to prepare an analysis of the number, location and ownership of all licenses within the City of Calistoga and to generally investigate the basis for the protest.

The entire investigative process was conducted pursuant to the standardized administrative procedures contained in the California Business and Professions Code and the ABC regulations. The investigation included contacting the Napa County Sheriff's Department, reviewing the internal agency records kept by the ABC relative to the respondents' operation in Yountville, and analyzing the claims of overconcentration in the City of Calistoga. The investigation was conducted by the ABC independently and the only input requested of the petitioners was to provide statistics when requested by Investigator Scurachio.

Both Pierce and Scurachio of the ABC testified at the time of trial that they, in their official capacities, had the discretion with respect to the recommendation to grant or deny respondents' application. The official report prepared by them and issued by the ABC recommended that the application be denied based upon an overconcentration of licensed premises within the City of Calistoga and aggravation of an existing police problem that would occur if the liquor license application were granted.

Pierce's testimony at trial pointed out that overconcentration of licensed premises alone would be a sufficient basis for denial of the license application. Pierce also indicated that the respondents' premises in Yountville had caused problems in the past and that two ABC warning letters had been sent to respondents in September 1974. This was considered important because the Calistoga Police Department had a total of seven men, with only two men on duty at any time.

The ABC report was sent to the respondents after a review by the ABC officials and staff attorneys. This notice specified that the issuance of the license would add to the undue concentration of licenses and aggravate an existing police problem, thus substantiating the position of petitioners making their protest of the application. The notice contained detailed information concerning the hearing rights accorded to respondents, including the right to be heard before an independent hearing officer and discovery rights existing under California law.

Respondents retained counsel to represent them and demanded a hearing. The hearing was held before an independent hearing officer of the California Office of Administrative Hearings. Respondents were present during the proceeding and were represented by counsel. After receiving testimony and reviewing the evidence, thhe Hearing Officer sustained the decision of the ABC to deny the license. (Appendix C) This decision was appealed by respondents and the ABC Appeals Board reversed the decision of the hearing officer. The ABC thereupon granted the license application of respondents. (Appendix D)

Respondents then filed suit in the United States District Court for the Northern District of California. The gravaman of the complaint is respondents' contention that Chief of Police Autry and City Councilmen Holtzen, Butler, Hively, Thom, and Smith, petitioners herein, protested the liquor license application because of respondents' racial background and that of respondents' clientele. Respondents elected to seek monetary damages solely under 42 U.S.C. Section 1983 and waived other theories of recovery. Respondents also brought suit against ABC investigator Scurachio and ABC District Director Pierce. Verdict was rendered for Scurachio and Pierce against respondents. That verdict is not the subject of appeal and has become final. Verdict was rendered for respondents against petitioners Chief of Police Autry and Councilmen Holtzen, Butler, Hively, Thom, and Smith for $48,500.00, which judgment is the subject of this petition.

REASONS FOR GRANTING THE WRIT

I

REASONABLE GOOD FAITH IN THE DISCHARGE OF OFFICIAL DUTIES IS A DEFENSE TO A CLAIM FOR MONEY DAMAGES UNDER 42 U.S.C. SECTION 1983

A compelling reason for granting this writ is the irreparable injury to our system of government by allowing six jurors to impose money damages on the elected officials without providing safeguards inherent in the doctrine of qualified good faith immunity. Petitioners herein timely proffered a jury instruction embodying the qualified good faith immunity defense available in actions under 42 U.S.C.

Section 1983. (Appendix E, p. 43.) The trial court refused to give the instruction or any other instructions presenting the issue to the jury. The Ninth Circuit affirmed, holding that evidence existed of racial discrimination and petitioners were therefore properly denied presenting the issue of qualified good faith immunity to the jury. This reasoning misinterprets the nature of qualified good faith immunity. Once properly pleaded and supported by any evidence, resolution of the issue is essential to any determination of whether discrimination recoverable under 42 U.S.C. Section 1983 occurred.

This court has repeatedly held that an official who is defending an action for money damages under 42 U.S.C. Section 1983 has a right to qualified good faith immunity. The official, discharging his official duties, is immune from monetary penalties if the official acts with the sincere belief he is doing right even if he makes a mistake in judgment, where the mistake in judgment is not unreasonable in light of all circumstances. *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 1589, 43 L.Ed.2d 79, reh den. 421 U.S. 921, 95 S.Ct. 1589, 43 L.Ed.2d 79 (1975); *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

In *Gomez v. Toledo,* ..... U.S. ....., 100 S.Ct. 1920, ... (1980) this court recently reaffirmed the qualified immunity available to a public official defending a suit under 42 U.S.C. Section 1983. The Court held that once properly pleaded, the issue of whether the conduct of the official was justified by an objectively reasonable belief that it was lawful is an element to be determined in any suit under 42 U.S.C. Section 1983. This court provided examples of what the official's belief may properly be based upon, including state

or local law and advise of counsel. These examples are particularly illustrative since evidence in this case was introduced that petitioners relied upon both of these areas in making their determination to protest respondents' liquor license.

Evidence was introduced at trial that petitioners were advised by the city attorney in reference to the protest of the liquor license with the ABC. Petitioners were also advised of state law under which the ABC operated in granting or denying liquor licenses and which provided that protests could be made. Despite the introduction of this evidence, the trial court refused to instruct the jury on the qualified good faith immunity.

Petitioners testified that one basis of their protest of respondents' liquor license application was the overconcentration of establishments serving alcoholic beverages which would result and the other basis was the fear of aggravating an existing police problem. Petitioners testified they did not wish to expose the City of Calistoga to such a police problem, especially in view of the limited police available. Respondents argued that the group of people sought to be excluded from the City by Petitioners was largely of Mexican-American origin and therefore petitioners were liable for money damages due to racial discrimination.

The Ninth Circuit's decision holds that petitioners' protest was objectively unreasonable as the expressed grounds were patently false. The court held that the issue of qualified good faith immunity therefore need not be presented to the jury. The court neglects to mention that the jury rendered a verdict in favor of the ABC employees whose in-

dependent investigation also found that the liquor license should be denied because of overconcentration and aggravation of police problems. The court also fails to mention that the independent hearing officer came to the same conclusion. This must conclusively indicate that there was sufficient evidence of petitioners' objective good faith to at least present the issue to the jury.

If the jury had been properly instructed, it would have decided the issue of whether or not petitioners honestly believed in good faith that the protest of the liquor license was right and lawful and whether this belief was reasonable. The jury was instead required to make a *de novo* determination of the official acts of the elected officials of Calistoga without regard to the subjective good faith of petitioners or whether the good faith was objectively reasonable. Under other legal theories (E.g. Civil Rights Act of 1964—Title VII) this result might be proper but not under 42 U.S.C. Section 1983 which is the only theory pursued by respondents.

The chilling effect of allowing monetary damages to be imposed upon public officials personally in the absence of the reasonable good faith immunity is clearly evident. Can the public expect their elected and appointed representatives to make decisions vigorously and efficiently when there looms the possibility that a decision may expose them to money damages even if the decision was made in reasonable good faith? If this Court allows this decision to stand, public officials must take the very real possibility of the imposition of money damages into account in making every decision. Officials will be forced to make this possibility the basis of their decision rather than the merits. This

second guessing can also be expected to result in qualified people refusing to serve their community, especially in positions of limited or no financial remuneration. Entering public service, moreover, does not terminate a public official's own constitutional rights. Deprivation of the official's personal estate without the application of proper law limiting his liability has this effect.

II

RESPONDENTS SUFFERED NO DEPRIVATION OF A CONSTITUTIONAL RIGHT COGNIZABLE UNDER 42 U.S.C. SECTION 1983

The Civil Rights Act of 1871, 42 U.S.C. Section 1983, was enacted by Congress as a damages remedy for vindicating cherished constitutional guarantees. *Owen v. City of Independence*, ... U.S. ....., 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). The Act was never intended to apply to every legally cognizable injury which may have been inflicted by a state official acting under color of state law. To provide such a federal remedy whenever the state may be characterized as the tortfeasor would create a font of tort law to be superimposed upon systems already administered by the states. This court has recognized that "constitutional shoales" would confront any such attempt to create a general body of federal tort law under the guise of enforcing 42 U.S.C. Section 1983. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 48 L.Ed.2d 811 (1976).

Evidence introduced at trial in this action indicated that at most petitioners' protest of respondents' liquor license application resulted in an independent investigation and administrative proceeding that admittedly provided

respondents due process of law. The administrative proceeding, moreover, ultimately resulted in a decision which was favorable to respondents. The Ninth Circuit held, however, that the delay engendered by petitioners' protest of the application was a sufficient violation of respondents' constitutional rights to support any recovery under 42 U.S.C. Section 1983.

Tho make the determination of whether a deprivation of a property right sufficient to constitute the basis for a claim under 42 U.S.C. Section 1983 inquiry must be made to state law as well as the Constitution. The deprivation or alteration of rights previously held under state law, in addition to rights specifically protected by the Constitution, provides sufficient basis for a claim under the statute. *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451, reh. den. 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976).

California state law does not recognize a right to sell alcoholic beverages. *Reimel v. Alcoholic Beverage Control Appeals Board*, 256 Cal.App.2d 158 (1967). There also exists no constitutional right to sell alcoholic beverages at the federal level. *Burnett v. MacNabb*, 565 F.2d 298 (6th Cir. 1977). As there exists no settled constitutional right cognizable under 42 U.S.C. Section 1983 to sell alcoholic beverages, it follows *a fortiori* that a mere delay in securing authorization to sell alcoholic beverages cannot constitute the violation of a right cognizable under 42 U.S.C. Section 1983.

The Ninth Circuit has held that a citizen has no constitutional right to be free from investigations by

administrative bodies. *Paskaly v. Seale*, 506 F.2d 1209 (9th Cir. 1974). The Circuit Court there held that a citizen of a state has no right to be free from the expense of defending himself in an administrative proceeding and, moreover, making a recommendation which initiated an administrative proceeding was specifically not a violation of a constitutional right which would be cognizable to support a claim for monetary damages under 42 U.S.C. Section 1983.

The decision by the Ninth Circuit Court of Appeals in this case drastically enlarges the scope of claims which will support an action in federal court and seriously runs afoul of the "constitutional shoals" inherent in such an expansion. If this writ is not granted the decision herein is precedent for a federal claim to be prosecuted by anyone whose wishes or expectations have in some way been delayed by the action of elected officials.

An additional basis for granting this writ is to conform conflicting decisions within the Ninth Circuit Court of Appeals. The Ninth Circuit decided in *Paskaly v. Seale*, *supra*, that instigating or recommending an investigation or administrative proceeding is not cognizable under 42 U.S.C. Section 1983 and cannot expose the official to monetary damages. *See also, Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962). In the cases at bar, monetary damages have been imposed upon elected officials for at most instigating an administrative proceeding which admittedly complied with due process. If this conflict is not resolved elected officials will have no hope of conforming their actions to the law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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July 29, 1980

(Appendices Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 77-2903

Barbaro Flores, et al.,
Plaintiffs-Appellees,
vs.
Stanley J. Pierce, et al.,
Defendants-Appellants.

[Filed May 7, 1980]

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: KENNEDY and PREGERSON, Circuit Judges, and BONSAL,* District Judge

KENNEDY, Circuit Judge:

This civil rights action was commenced in district court by two Mexican-Americans who alleged that officials of the City of Calistoga, California, delayed issuance of a liquor license to them by filing official protests motivated by a purpose to discriminate on the basis of race or national origin. A jury rendered a verdict against the city officials, who now appeal from the judgment against them.

*Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, sitting by designation.

The principal issues here are whether the evidence was sufficient to support a finding that there was a constitutional violation resulting in damage, and whether the trial court erred in failing to instruct the jury that a finding of good faith in filing the protest would be a defense to the action. Our review leads us to conclude that there was sufficient evidence for the jury to decide that the city officials, acting under color of law, did violate the Constitution by filing protests that were motivated in substantial part by the race or national origin of the applicants and that damages were shown. We also conclude that officials who discriminate invidiously are not entitled to good faith immunity in an action under 42 U.S.C. § 1983. We therefore affirm.

The appellees, plaintiffs below, are Barbaro and Alma Flores, husband and wife, both of whom are of Mexican origin. The Floreses were proprietors of a restaurant and bar in Yountville, California, called the Mexicali Rose. The Floreses, by the name of the restaurant and its ambience, including the music, the decorations, and the brands of beer served, sought to attract a Mexican-American clientele, and they were successful in doing so. In July, 1974, the Floreses decided to open a second establishment in Calistoga, a city of 2,200 people, located about twenty miles from Yountville. They leased the premises and made arrangements to open a Mexican restaurant called The Palacio, anticipating that the clientele there also would be comprised in large part of Mexican-Americans. In September, 1974, the Floreses applied for a type 41 liquor license from the Department of Alcoholic Beverage Control

of the State of California (ABC), a license which would permit them to serve beer and wine in the restaurant.

Upon learning of the Floreses' license application, the Calistoga police chief, one James Autry, filed a protest with the ABC. The stated grounds for the protest were that granting the license would lead to an undue concentration of licenses in Calistoga and aggravate an existing police problem. Autry and several Calistoga townspeople also brought the Floreses' application to the attention of Mayor Butler and city council members Holtzen, Hiverly, Thom, and Smith. Acting in their official capacities, Mayor Butler and the city council protested the Floreses' application. About three months later, like protests were also lodged against the application of one Grusdiv, who applied for a liquor license for a pool hall. His clientele consisted almost entirely of Mexican-Americans.

Under California law, a protest by a city operates to block issuance of the license until a hearing is held. *See* Cal. Bus. & Prof. Code § 24013. After hearings were held on the Flores and Grusdiv applications, the ABC denied both applications. As a result, when the Floreses opened their resturant on February 6, 1975, they could not serve beer or wine. The Floreses appealed the denial of their application to the Alcoholic Beverage Control Appeals Board. The ABC had at all times conceded that the Floreses had the requisite good moral character to obtain a license. The only question, apparently, was the suitability of the location chosen. The Appeals Board reversed the ABC, and the Floreses' license was finally granted on September 22, 1975.

The Floreses brought suit for damages under 42 U.S.C. § 1983 against the police chief, the mayor, and the city councilmen named above.[1] The case was tried by a jury which returned a general verdict for the Floreses in the amount of $48,500.

It is undisputed on appeal that state action is involved here. The defendants all acted in their official capacities in protesting the application. The Floreses' right under the equal protection clause to be free of state action which purposely discriminates on the basis of race or national origin is also clear. The question is whether the Floreses presented sufficient evidence at trial so that a rational jury could conclude that the defendants violated the Constitution by acting with an intent to discriminate on the basis of race or national origin.

The evidence is tested here by the appellants' claim that the trial court erred in denying their motions for judgment notwithstanding the verdict and for a new trial. A directed verdict or judgment notwithstanding the verdict should not be granted "unless the evidence permits only one reasonable conclusion as to the verdict." *Kay v. Cessna Aircraft Co.*, 548 F.2d 1370, 1372 (9th Cir. 1977). The evidence must be viewed in the light most favorable to the prevailing party and all inferences must be drawn in that party's favor. *Id.*; *see also Fountila v. Carte*, 571 F.2d 487, 490 (9th Cir. 1978). In light of these standards, we conclude that there was no basis for directing a verdict for

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[1]Certain officials of the ABC were also named in the suit. There was little or no evidence indicating that they acted with a discriminatory intent and they were not found liable.

the appellants or setting aside the judgment granted against them.

Evidence of Intent

The impact and effect of law or government action may weigh more adversely on one racial group than another without violating the Constitution. The essence of an equal protection violation on racial grounds lies in the intent or motive to discriminate. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). This proposition does not detract, however, from the fundamental rule that disparate racial effect is evidence that may be adduced to prove the invidious intent that is the essence of the violation. Disparate racial impact is of unquestioned relevance in proving the forbidden intent to discriminate. One of the first cases interpreting the equal protection clause stands for the rule, among others, that the effect of a law may be so harsh or adverse in its weight against a particular race that an intent to discriminate is not only a permissible inference but also a necessary one. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In the instant case, the disparate effect of the action on Mexican-Americans was so compelling that the effect may approach, if it does not reach, the demonstration of an intent to discriminate that was made in *Yick Wo v. Hopkins*. This might be a case where "a clear pattern, unexplainable on grounds other than race, emerges from the state action." *Arlington Heights, supra*, 429 U.S. at 265. We need not, however, rely on effect alone, for other evidence suggests a motive or intent to discriminate. It was shown that the defendant city officials deviated from previous procedural patterns,

that they adopted an ad hoc method of decision making without reference to fixed standards, that their decision was based in part on reports that referred to explicit racial characteristics, and that they used stereotypic references to individuals from which the trier of fact could infer an intent to disguise a racial animus. In view of these factors and the showing of a disparate effect, it suffices for us to conclude, as we do, that the evidence in its entirety was sufficient to support the judgment. *See id.* at 267-68.

We begin by discussing the evidence of the disparate and adverse impact on Mexican-Americans resulting from the actions of the city officials. In a seven-month period between May and December, 1974, there were five liquor license applications for premises in Calistoga. Three of the applications were by persons who were not Mexican-Americans for premises that would primarily serve a clientele that was not Mexican-American. No city protests were filed against these applications. Of the remaining two, one was by the Floreses and the other by Grusdiv, whose clientele was 98% Mexican-American. Both of these applications were protested. The licenses that were granted without protests were for premises in the same neighborhood in which the Floreses and Grusdiv sought to do business. The two licenses that were protested were for beer and wine only, while the three licenses that were not protested were in one case for beer and wine, and in other cases for service of stronger alcoholic beverages. There is thus no possibility that the protests in the instant case can be explained on the grounds of undue concentration or the purpose to promote temperance. The premises leased by the Floreses in Calistoga had been licensed for alcoholic

beverages sales to the previous occupant for 34 years, and the city had never objected to that use.

The pattern of selective protests undercuts the appellants' claim that they acted to prevent an undue concentration of licenses in Calistoga. Indeed, it appears that the defendants were provided with this technical justification by counsel after they had made the decision to protest. Police chief Autry was specifically informed by the ABC that he could not, in the ABC's words, "pick and choose" the applications he would protest and that to do so would be to discriminate. He continued, nevertheless, the policy of selective protests affecting the Mexican-American establishments in question.

The selective protests also belie the contention that the defendants acted to prevent aggravation of an existing police problem. There is simply no support in the evidence that there was a police problem in Calistoga, or that the the presence of the Floreses and their clientele would lead to increased crime there. The county sheriff having jurisdiction over the Floreses' establishment in Yountville testified that the premises were not a police problem and that the Floreses consistently cooperated with his department and with the Yountville police. The ABC specifically found the Floreses to be of good moral character. Selective protests and disparate impact on the Floreses create substantial grounds for inference of discriminatory intent.

The record makes clear that the appellants were aware that the Floreses and Grusdiv had a clientele that was almost exclusively Mexican-American. The adverse impact of the officials' action was, almost by definition in this case,

a foreseeable consequence of the selective protest policy. The Supreme Court has stated as follows in this regard:

> [A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. Those cases do not forbid "the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn." Adherence to a particular policy or practice, "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn."

Columbus Bd. of Education v. Penick, 99 S. Ct. 2982 (1979) (citations omitted).

There were also significant departures from prior procedural sequences here which point toward discriminatory intent. The Calistoga city council had never issued protests against liquor license applications in Calistoga before the case in question. Chief Autry had never protested an application before the Floreses' case arose. No application by an owner who was not Mexican-American for an establishment that would cater to persons who were not Mexican-Americans was protested either before or after the incident in question. The city council rejected a proposal for a uniform protest policy and insisted upon an ad hoc approach.

There is also evidence that the defendants acted with reference to racial classifications and offered explanations which invoked stereotypes from which one could infer an

intent to adopt a racial classification. Autry specifically justified his protests by reliance on reports from sheriff's officers and police officials in Yountville who in earlier ABC investigations had stated that police problems had been aggravated "by the large number of Mexican field workers in the area to harvest the grapes." Autry also relied on police reports that specifically identified both participants and witnesses in various incidents as being of Mexican origin. The council passed a resolution instructing the police chief to bring applications for new liquor licenses to the council so that it could determine "the desirability of the applicant" and protest accordingly. Councilman Holtzen, one of the defendants, in response to questioning regarding the term "desirability," stated that Calistoga was "a fine little town," and that it was necessary to keep the town on a "good level." Against the background recited above, the jury may well have concluded, in view of the selective protests and the Mexican background of the Floreses and of the Grusdiv clientele, that the explanations given by the defendants for their actions were simply pretexts to conceal an intent to act upon stereotypic classifications which resulted from a racial animus.

The evidence here was more than sufficient to support a finding that the appellants acted with the purpose and intent of discriminating on the basis of race or national origin.

Causation

Appellants claim that the protest by city officials did not injure the Floreses since the ultimate decision to approve the license rests with the ABC and the state agency found the protests meritorious after the first hearing. We dis-

agree. The violation here consisted not in the ABC's initial denial of the license, but in the policy of the city officials to force the applicants to undertake extraordinary measures for its issuance. If the rigors of the governmental or administrative process are imposed upon certain persons with an intent to burden, hinder, or punish them by reason of their race or national origin, then this imposition constitutes a denial of equal protection, notwithstanding the right of the affected persons to secure the benefits they seek by pursuing further legal procedures. *Hunter v. Erickson*, 393 U.S. 385 (1969); *see also Reitman v. Mulkey*, 387 U.S. 369 (1967).

The evidence establishes that the defendants' protests were intended to, and did, cause the ABC to delay issuance of the license. Protests made by public officials or by the governing body of a city or county stand on a different footing from the protests of private citizens. The ABC may reject protests of private citizens and issue a license without holding a hearing if it determines that the protests are "false, vexatious, or without reasonable or probable cause. . . ." Cal. Bus. & Prof. Code § 24013. If, however, a protest is made by public officials or by the governing body of the city or county, then the ABC may not issue a license until after it holds a hearing. *Id.* There was testimony, moreover, that it is an ABC policy to sustain an official protest if there is any color of merit to it, at least in the first instance. The ABC regional director testified that if the city officials here had not protested, he would have recommended initial issuance of the license. There was sufficient evidence in the record to infer causation and damage without this testimony, but its addition to the

evidence all but compels a finding for the appellees on these issues. The argument that causation was not shown is therefore rejected.

Qualified Immunity

The Supreme Court, and this court, have specifically left open the question whether individuals performing legislative functions on the purely local level are entitled to the absolute legislative immunity of *Tenney v. Brandhove*, 341 U.S. 67 (1951). *See Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 n.26 (1979); *Morrison v. Jones*, 607 F.2d 1269, 1274 (9th Cir. 1979) (per curiam), *cert. denied*, 48 U.S.L.W. 3662 U.S. Apr. 15, 1980). This question is not presented for our review in this case. The defendant city councilmen did not ask for an instruction regarding absolute immunity in the trial court; they only asked that the jury be instructed on the defense of qualified immunity. On this appeal, moreover, appellants do not raise the question of absolute legislative immunity and even appear to concede that they are entitled to no more than qualified immunity. We do not, therefore, address the question previously left open, and we confine our review on this aspect of the case to appellants' contention that it was error to refuse an instruction based on immunity for actions taken in good faith.

The district court refused to instruct the jury that the defendants were entitled to immunity if they acted in good faith in protesting the Floreses' application. The district court was correct, for on this record there was no basis to support a finding of good faith. Appellants'

reliance on *Wood v. Strickland*, 420 U.S. 308 (1975), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974) to support their argument that they are entitled to an instruction regarding qualified immunity is wholly misplaced. In *Wood* the Supreme Court ruled that a state official is not immune from liability from damages under section 1983

> if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

420 U.S. at 322.

There are objective and subjective aspects to the defense of good faith immunity. *See Morrison v. Jones*, *supra*, 607 F.2d at 1274; *Johnson v. Duffy*, 588 F.2d 740, 745 (9th Cir. 1978); *Walker v. Hoffman*, 583 F.2d 1073 (9th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 1127 (1979). There is no objective basis for the defense if it is not reasonable to believe that there was a lawful right to take the action in question. In this respect state officials are liable under section 1983

> if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm.

Procunier v. Navarette, 434 U.S. 555, 562 (1978). As to the subjective aspect of the defense, an official forfeits immunity if, whatever the objective state of the law at the time of his action, his own intent was to harm the plaintiff

for a reason prohibited by the Constitution. *McNamara v. Moody*, 606 F.2d 621, 625 (5th Cir. 1979).

The objective test is not satisfied here because these appellants had no reasonable grounds to believe that they could file a protest against the Floreses' application because of the Floreses' national origin. No official can in good faith impose discriminatory burdens on a person or group by reason of a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it. *Cooper v. Aaron*, 358 U.S. 1 (1958). We hold, moreover, that once a defendant is shown to have acted with intent to discriminate based on racial or ethnic hostility, such intent constitutes the malicious intention to cause a deprivation of constitutional rights that is inconsistent with the subjective state of mind required for the defense of good faith immunity.

In view of this analysis, it was not necessary to instruct the jury as to qualified immunity. If the jury found that if the defendants acted with the proscribed discriminatory intent, the defendants would not have been entitled to immunity; if, however, discriminatory intent were not proved, then there would be no violation of the equal protection clause, no cause of action under section 1983, and no need for immunity to protect an official from liability for damages. Under the first possibility immunity is not present and under the second it would not be needed. Defendants' contention that the failure to instruct

the jury regarding a defense of qualified immunity was error is therefore without merit.

Damages

Appellants claim that the award of $48,500 in damages was excessive as a matter of law and that the district court erred in denying a motion for a new trial on this ground. We hold the verdicts are supported by the evidence and within permissible limits.

We will not disturb an award of damages on appeal unless it is clear that the evidence does not support it. *Fountila v. Carter, supra,* 571 F.2d at 492; *Peacock v. Board of Regents,* 597 F.2d 163, 165 (9th Cir. 1979); *Hanson v. Shell Oil Co.,* 541 F.2d 1352, 1359 (9th Cir. 1976). In *Donovan v. Reinbold,* 433 F.2d 738, 743 (9th Cir. 1970), we stated:

> Compensatory damages awardable in a Civil Rights Act case are not limited to the out-of-pocket pecuniary loss the complainant suffered. Damages can also be awarded for emotional and mental distress caused by the intentional tort.

See also Cary v. Piphus, 435 U.S. 247 (1978). The evidence submitted showed that the Floreses lost profits during the period they were without a liquor license, that they incurred additional attorneys' fees because of the official protests, and that they suffered emotional distress from the selective protests and the denial of their application. These factors were entirely sufficient to sustain the damage award.

The other contentions of appellants are without merit. The judgment of the district court is AFFIRMED.

Appendix B

United States District Court
for the
Northern District of California

Civil Action File No. C75-2353 ACW

Barbaro Flores and Alma Flores

vs.

Stanley J. Pierce, Anthony B. Scurachio, James N. Autry, Peter Holtzen, Warren Butler, Kenneth M. Hively, Clarence Thom and C. W. Smith

[Filed March 14, 1977]

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Albert C. Wollenberg, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that judgment be entered against plaintiffs and in favor of defendant Stanley J. Pierce.

It is Ordered and Adjudged that judgment be entered against plaintiffs and in favor of defendant Anthony B. Scurachio.

It is Ordered and Adjudged that judgment be entered in favor of plaintiffs and award general damages in the sum of $48,500.00 against the following defendants:

James N. Autry
Peter Holtzen
Warren Butler
Kenneth M. Hively
Clarence Thom
C. W. Smith

Dated at San Francisco, California, this 14th day of March, 1977.

T. J. Wright

.....

Deputy Clerk of Court

Appendix C

REPORT ON APPLICATION FOR LICENSE UNDER ALCOHOLIC BEVERAGE CONTROL ACT

1. Division Northern 2. District or Branch Santa Rosa

3. Date 12-9-74

4. Name of Applicant Flores, Alma & Barbaro 532-36-1653/567-50-1480

5. DBA Palacio

6. Address of Premises 1400 Lincoln Ave., Calistoga 94515 2801
(Zip Code) (Geographical Code)

7. Mail Address (If Different) 506 Silverado Trail, St. Helena 94574 perm.
(Zip Code) (Temp. or Perm.)

8. Licenses Applied for 41 9. Temporary License Issued no
(Yes or No)

10. Type of Transaction original
(If intercounty transfer, show transferor's county)

11. License Already Held 12. Eff. Date/Est. Compl. Date issuance

13. Copies Mailed *8-30-74 14. Pub. Date/Name 9-5-74
(Date)
Weekly Calistogan

15. Date Premises Posted 9-5-74 16. Date Inspected 9-5-74

17. Where Posted On front door, 6' high, dated 9-5-74.

18. Transferred From
License No.

19. Pending Disciplinary Action Against Transferor
(Use Red Type)

20. Transferor's License Originally Issued After June 1, 1961 (Yes or No)

(If Yes, enter date)

21. Former Licensee at These Premises Ottenello, Edward A., Mary & Ottoa tfr to other person & premises 5-15-73

22. License No. 48-29107 ABC-231 Att.
(Yes or No)

ABC-226 Att.
(Yes or No)

23. Renewal Fee Paid: Date Rec. No.
Amount

24. Mail License to District Office (Yes or No) no

25. Hearing Time 4 hrs.

26. Remarks Supplemental application—late publication. Protests have been received from James Autry, COP, Calistoga, and City of Calistoga

27. If Recommendation Is Denial, Use Red Type

Denial:

Recommendation Anthony B. Scurachio 12/12/74
(Investigator) (Date)

E. J. Spitzley 12-12-74
(Supervisor) (Date)

Denial:

Recommendation Stanley J. Pierce 12-12-74
(District Administrator) (Date)
For Division Review yes
(Yes or No)

Recommendation Denial B. M. Grant 12-13-74
(Assistant Director) (Date)

Review J. Whitfield 12-18-74

Report On: 28. Moral Character 29. Premises and 30. Financing:

28. Moral Character:

Applicants have been husband and wife since 10-28-62.

Alma Flores, born 1-1-44, age 30. First application for a licensed. Employment record on 208. CII and 208 show no arrests.

Barbaro Flores, born 12-4-39, age 34.

Lic. History: 40 lic. 2-9-71 to date w/partner and alone at 6512 Washington St., Yountville; no record of any discp. action.

Arrest:

April, 1974 Fairfield Having a loaded gun within city limits fine $12. See report of protest for further permits or prior operations.

29. Premises: Mexican Restaurant & Bar

Premises is located in the heart of the business district in the City of Calistoga. Premises is on the ground floor of a two-story stucco and wood building. Premises will have a bar seating 10 persons. The dining room will seat approx. 50

persons. The kitchen has a U.S. gas range; 4 burners and 12-inch griddle (commercial type); commercial refrigerator; 3-compartment sink, dishes, forks, pots, pans, etc. Complies with Sec. 23038 and local health regulations and Sec. 23790.

Hours of Operation; 11 pm to 2 am, 7 days a week.

Mexican-type food to be served 7 days a week.

Lic. History: 48 lic. 12-39 to 5-15-73.

See report on protest for further details on premises.

30. Financing: Total consideration is $9,909.

They have revised the financing of this venture.

$4,400 in the Bank of America, St. Helena, is to be used for new equipment purchased and for fees, etc. Account in this bank, second book shows 12-10-70.
5,509 to come from business and from his pay as needed.

$9,909

Control of Premises:

Lessor: Dunya Chernenko Zaitzeff
Lessee: applicants

Terms: $400 per month; expires 8-14-77. Copy of lease in file.

Denial

Issuance of the above license would be contrary to public welfare and morals within the meaning and intent of Article XX, Sec. 22, of the Constitution of the State of California, Sec. 23001 and 23958 of the Alcoholic Beverage Control Act, in that there are sufficient licenses located in the City

of Calistoga to satisfy the public demand of those persons who normally patronize the area. Therefore, the issuance of the above-described license would result in an undue concentration of licenses within the City of Calistoga and would aggravate an existing policing problem.

Reasons for Denial

1. Protests have been filed by the City of Calistoga and the Chief of Police of Calistoga, alleging that there is a concentration of licenses in the City of Calistoga and the issuance of this license would create a law-enforcement problem.

2. At the present time the City of Calistoga has a population of 2,200 and ABC Dept. records show that the following licenses have been issued in the City of Calistoga:

4—On Sale General Eating Place licenses
2—On Sale General Public Premises licenses
5—On Sale Beer & Wine Eating Place licenses
2—On Sale Beer licenses
3—Off Sale General licenses
1—Off Sale Beer & Wine license

17—Total number of licenses issued

3. The Calistoga Police Dept. has only seven full-time police officers and four reserve police officers to provide a 24-hour-a-day, 7-days-a-week coverage for the citizens of the City of Calistoga. It has been the experience of the Chief of Police of Calistoga that establishments selling alcoholic beverages require additional police services; therefore, the the issuance of the license would aggravate an existing police problem.

Report of Investigation of Protest & Denial

Summary of Report: On 8-30-74 an application was filed by the applicants for a new On Sale Beer & Wine Eating Place license for a premises located at 1400 Lincoln Ave., Calistoga. One of the applicants, Barbaro Flores, is currently licensed with a type 40 license at 6512 Washington St., Yountville, DBA Mexicali Rose. Protests were filed by the City of Calistoga and the Chief of Police of Calistoga, alleging that the applicant's licensed premises in Yountville was operated in a disorderly manner and that the issuance of a license to the applicant in the City of Calistoga would result in a concentration of licenses, and that there were already sufficient licenses to serve the needs of the public.

Investigation of protests does establish that there appears to be sufficient licenses to satisfy the public demand for alcoholic beverages and that the issuance of any additional licenses would result in a concentration of licenses and would aggravate an existing law-enforcement problem.

Protestants and Persons Involved

1. Barbaro and Alma Flores, dba: The Palacio, 1400 Lincoln Ave., Calistoga, applicants for a new 41 license
2. Warren Butler, Mayor of Calistoga, protestant
3. James Autry, Chief of Police of Calistoga, protestant
4. David York, Attorney for the City of Calistoga
5. Earl Randol, Sheriff of Napa County
6. Anthony Scurachio, S.I., Dept. of ABC, Santa Rosa
7. John Kemp, S.I., Dept. of ABC, Santa Rosa
8. Stanley J. Pierce, District Administrator, Dept. of ABC, Santa Rosa

Evidence & Exhibits

1. Protest of the City of Calistoga signed by Warren Butler, Mayor, dated Oct. 16, 1974, accepted by the Dept. as an official protest under Sec. 240 B.

2. Protest by Calistoga Chief of Police, James Autry, dated Oct. 8, 1974, accepted by the Dept. as an official protest

3. List of Alcoholic Beverage licenses located within the City of Calistoga

4. Map of the City of Calistoga showing location of applicant's proposed premises, and other licensed premises in the City of Calistoga.

5. Crime Statistic Reports from the City of Calistoga for the period of December, 1973 through November, 1974.

6. Police Reports received from the Napa Co. Sheriff's Office covering incidents that occurred at the Mexicali Rose Bar, a licensed premises operated by the applicants at 6512 Washington St., Yountville, during the period from 2-1-71 through 8-2-74.

7. Letter, dated 11-20-74, from Earl Randol, Sheriff of Napa Co., regarding applicant's operation of the Mexicali Rose in Yountville.

8. Certified copies of the minutes of the Yountville City Council of Oct. 19th & 23rd, 1973 and Oct. 8th, 1974, referring to complaints regarding the operation of the Mexicali Rose.

9. Investigation Report #73-402-R, dated 1-22-74, of S.S.I. John Kemp, covering disorderly premises investigation of the Mexicali Rose premises.

10. Memo of District Administrator, Stanley J. Pierce, dated 11-9-73, covering a meeting held with applicant licensees at Yountville City Council on 11-1-73, regarding alleged disorderly operation of the Mexicali Rose bar.

11. Copy of letter of warning from Dist. Adm. S. J. Pierce, dated 5-15-74, to the applicants, regarding sales to minors at the Mexicali Rose.

12. Copy of letter of warning from Supv. E. J. Spitzley, dated 9-18-74, to the applicants, regarding a shooting incident in the Mexicali Rose.

Narrative

On Aug. 9, 1974, the applicants filed an application for a new On Sale Beer & Wine license for premises located at 1400 Lincoln Ave., Calistoga; however, due to the fact that the Notice of Intention to Engage in the Sale of Alcoholic Beverages was not published within 20 days, it was necessary to file a supplemental application on Aug. 30, 1974, in order to comply with Rule 111 of the ABC Dept. Rules. Within 30 days of the filing of their application official protests were filed by the City of Calistoga and the Chief of Police of Calistoga. In summary, their protests alleged that there were sufficient licenses in the City of Calistoga to serve the needs of the public and the issuance of this license would result in an undue concentration of licenses and would cause a police problem. In alleging the police problem the protestants set forth that the applicants were presently licensed in the City of Yountville; that their premises at that location had been operated in a disorderly manner; for exact detail on protests see attached copies of the

The applicant's proposed premises are to be operated as a Bona Fide Eating Place featuring Mexican type meals. This location was formerly licensed with an On Sale General license from approx. 1939 to May 15, 1973 when the license was transferred to another location. Since that date the premises have been vacant. During the time the premises was licensed there was no disciplinary action. The premises are in a two-story stucco and frame building located in the center of the downtown business district of Calistoga. At the present time there are a total of 17 licenses located within the City of Calistoga. See attached list for the names, addresses, and types of licenses and the attached map showing the locations of the licensed premises in relation to the applicant's premises. The 17 licenses consist of the following types:

Four (4) On Sale General Eating Place licenses
Two (2) On Sale Public Premises licenses
Five (5) On-Sale Beer & Wine Eating Place licenses
Two (2) On Sale Beer licenses
Three (3) Off Sale General licenses
One (1) Off Sale Beer & Wine license

The majority of the licenses are located within 600 ft. of the applicant's proposed premises. The City of Calistoga has a population of approx. 2,200 people. They have a police force consisting of 7 full-time officers and 4 reserve officers to provide law enforcement for the City on a 24-hour-a-day, 7-days-a-week coverage. This provides only a minimum of police protection during an 8-hour shift. Chief of Police, James Autry, will produce statistical reports to establish that his small department is already overburdened and the issuance of any additional licenses would add to the prob-

lem. Furthermore, it is Chief of Police Autry's opinion that, based upon the applicant's operation of their licensed premises in Yountville, he can anticipate that they will operate their premises in such a manner as to require additional police services.

At the present time one of the applicants, Barbaro Flores, holds an On Sale Beer license at 6512 Washington St., Yountville, DBA: The Mexicali Rose. Flores has been licensed at this location as a partner or sole owner since 2-9-71. During this period of time there have been no accusations filed against his license. However, a number of complaints have been received regarding the operation of these premises from the Napa Co. Sheriff's Office, The Yountville City Council, and citizens of Yountville, who reside in the vicinity of the Mexicali Rose. These complains involve noise, fights, shootings, sales to minors, and general disorderly operation of said premises. Copies of complaints, Sheriff's Office Reports, City Council Minutes, ABC Dept. Investigation reports, and warning letters are either attached to this report or are in the files of the Santa Rosa ABC Office.

As a result of the investigation of the complaints that were received, the licensees were given two letters of warning. One warning involved sales to a minor and the other involved a shooting that occurred in the premises. In addition to the letters of warning, a formal meeting was held with the licensee and his attorney before the Yountville City Council on 11-1-73, to discuss complaints received by the Yountville City Council from citizens regarding the disorderly operation of the Mexicali Rose. Copy of memo from Dist. Adm. Stanley J. Pierce, covering this meeting,

is attached. A complete report covering this investigation of this complaint by S.S.I. John Kemp is on file in the Santa Rosa ABC Office.

Since the meeting with Flores before the Yountville City Council on 11-1-73, the operation of his premises in Yountville has improved somewhat. Napa Co. Sheriff, Earl Randol, confirmed this in a letter to the ABC Dept. dated 11-20-74. However, based upon the above information, it is the opinion of the Dist. Adm. S. J. Pierce, that Flores' premises in Yountville has been more of a policing problem than the average On-Sale premises in the Santa Rosa District.

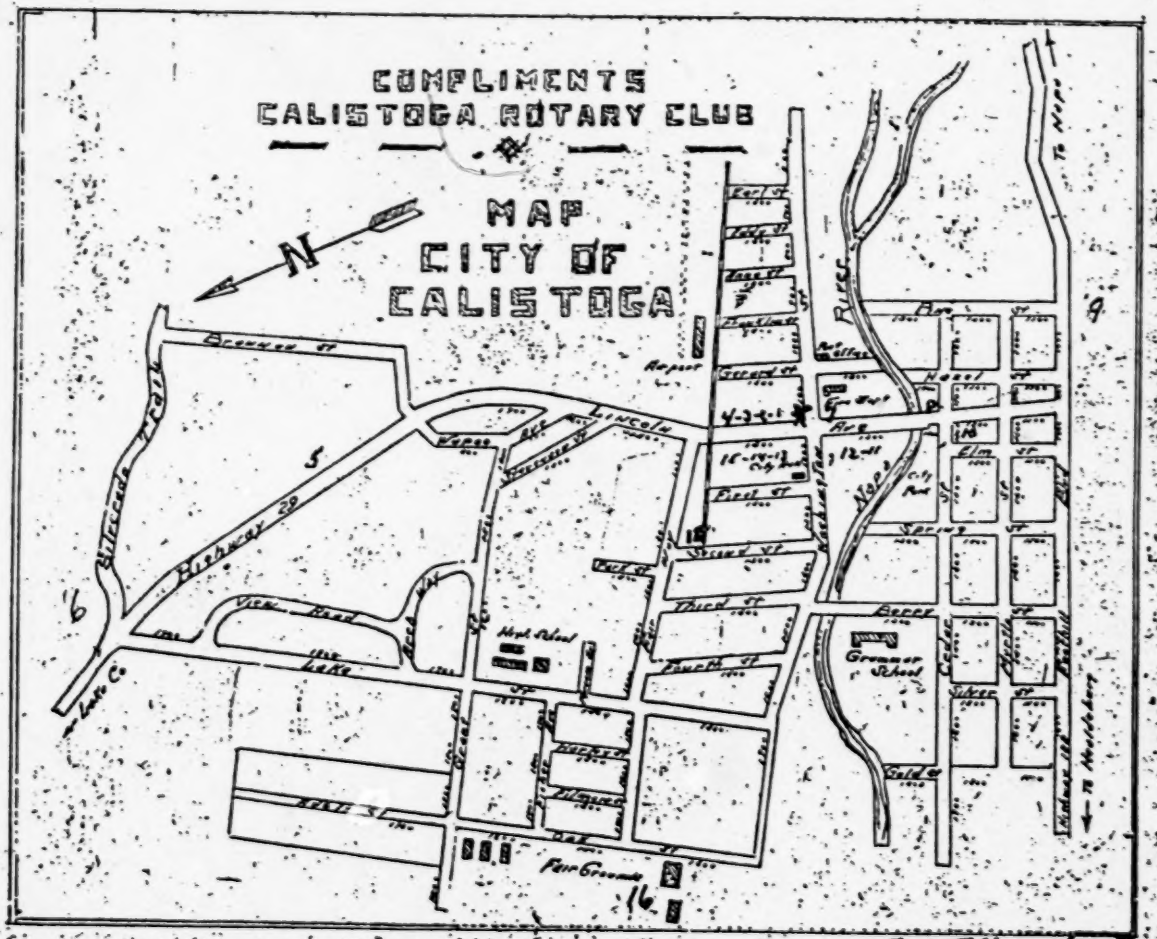
Conclusion

It is the opinion of District Administrator, S. J. Pierce, based upon the above information, that the protests in this case are justified and that the application should be denied on the grounds set forth under recommendation.

List of Licensed Premises in Calistoga

1.	James J. & Rosemarie R. Johnson dba: Surfwood 1410 Lincoln Ave., Calistoga	Lic. 48-26659 On Sale General Public Premises
2.	Betty E. & Burrell C. Coil dba: Susie's 1436 Lincoln Ave., Calistoga	Lic. 48-32023 On Sale General Public Premises
3.	Charles H. & Herbert R. Hanly dba: Hanly's Smoke Shop 1430 Lincoln Ave., Calistoga	Lic. 21-22869 Off Sale General
4.	Maha & Tarek Baroody dba: Bianco's 1440 Lincoln Ave., Calistoga	Lic. 41-20723 On Sale Beer & Wine Eating Place
5.	Lois G. & Stanley Mentink dba: Royal Inn 1880 Lincoln Ave., Calistoga	Lic. 47- On Sale General Eating Place

6.	Gregory Lyons dba: Les Pyrenees 2082 Lake County Hwy., Calistoga	Lic. 41-03377 On Sale Beer & Wine Eating Place
7.	Alice L. & Joseph O. Guerrera dba: The Colonial 1368-74 Lincoln Ave., Calistoga	Lic. 47-15330 On Sale General Eating Place
8.	George R. Browman & Gerard J. Gagnon dba: Calistoga Inn 1250 Lincoln Ave., Calistoga	Lic. 47-06770 On Sale General Eating Place
9.	Paul C. & Susan E. Manfredi dba: The Citadel 1009 Foothill Blvd., Calistoga	Lic. 41-64895 On Sale Beer & Wine Eating Place
10.	Harold B. Reeder dba: Reeder's 1237 Lincoln Ave., Calistoga	Lic. 40-45623 On Sale Beer
11.	Carmen D. & Gregorio Hernandez dba: El Faro 1353 Lincoln Ave., Calistoga	Lic. 41-28042 On Sale Beer & Wine Eating Place
12.	Merle E. & Peter D. Holtzen dba: Pete's Delicatessen 1359 Lincoln Ave., Calistoga	Lic. 20-67366 Off Sale Beer & Wine
13.	Patricia & Shefki Citaku dba: Alex's Fine Food 1437 Lincoln Ave., Calistoga	Lic. 47-26611 On Sale General Eating Place
14.	Maha & Tarek Baroody dba: Mt. View Coffee Shop 1457 Lincoln Ave., Calistoga	Lic. 41-47095 On Sale Beer & Wine Eating Place
15. & 16.	Bess Ghisolfo dba: Johnny's Place 1463 Lincoln Ave., Calistoga	Lic. 21-24542 Off Sale General Lic. 48-24542 On Sale General Public Premises
17.	Napa County Fair Association dba: Napa County Fair 1435 Oak St., Calistoga	Lic. 40-15908 On Sale Beer
18.	Fairway & 2d	


COMPLIMENTS
CALISTOGA ROTARY CLUB
MAP
CITY OF
CALISTOGA
N
Highway 29
Silverado Trail
Lincoln
Grant St
Fair Grounds
Grammar School
Hot Mineral
Vine Hedge
Lake Co.
To Napa
To Middletown
Railroad
Pine
Hazel
Elm
Spring
Cedar
Hyatt
Bethel
Silver
Gilead
Oak
Myrtle
Wilkens
Fair Grounds
Rec. Hall
City Hall
Fire
Pool
Park
Rec. Park
Fire Station
Grade School
Fair Grounds
Vine Hedge
Lake
Creek
Ditch
Levee
Levee Rd.
Ditch
Creek
Lake
Lake Co.
Silverado Trail
Highway 29

Appendix D

Before the Alcoholic Beverage Control Appeals Board
Of the State of California

AB-4164
File No. 51962; Reg. No. 1690
H/O: Coffman

Time and Place of Hearing:
August 7, 1975, at 10 a.m.
World Trade Center
San Francisco, California

For Department:
Honorable Evelle J. Younger
Attorney General
Charlene Grogan-Beall
Deputy Attorney General

For Appellants:
Robert Gonzales, Esq.

For Protestants:
David York, Esq.

In the Matter of the Protest of
James N. Autry, Chief of Police
1232 Washington Street
Calistoga, et al.

against the issuance of an on-sale
beer and wine license to:

Alma & Barbaro Flores (appel)
dba Palacio
1400 Lincoln Avenue
Calistoga

and in the Matter of the
Petition for said license

under the Alcoholic Beverage
Control Act.

[Filed Aug. 19, 1975]

Appellants (applicants) have appealed a decision of the Department of Alcoholic Beverage Control which, after a hearing on the petition for and protests against issuance of an on-sale beer and wine license to appellants, determined the findings established that issuance of the license would be contrary to public welfare and morals under section 22, article XX, of the state Constitution and section 23958 of the Business and Professions Code in that licensing of the premises would aggravate an existing police problem and would result in and add to an undue concentration of licenses within the City of Calistoga. It was ordered that the petition be denied and the protests sustained.

This appeal is based upon the grounds:

"(a) Whether the department has proceeded without, or in excess of, its jurisdiction.

"(c) Whether the decision is supported by the findings.

"(d) Whether the findings are supported by substantial evidence in the light of the whole record."

The department's decision further provides:

"FINDINGS OF FACT:

"I

"Protestants City of Calistoga and James N. Autry, Chief of Police of the City of Calistoga, were represented by their attorney, David R. York.

"Petitioners' objection to the protest of Autry on the ground the protest was not timely filed, under section 24013 of the Business and Professions Code, is hereby overruled.

"Petitioners' objection to the protest of the City of Calistoga on the basis that the grounds of protest were not timely filed under section 24013 of the Business and Professions Code is hereby overruled.

"II

"The premises are located on the corner of Lincoln Avenue and Washington Street in the center of the business district of the City of Calistoga. The business district consists in two blocks of commercial establishments along Lincoln Avenue.

"III

"There are 18 licensed premises in the City of Calistoga, 14 on-sale licenses and 4 off-sale. There are 14 licensed premises along Lincoln Street within one block of the subject premises, 10 on-sale and 4 off-sale.

"The population of Calistoga is approximately 2,230.

"IV

"Petitioners operated an on-sale beer establishment in Yountville, California, from 1971 to January 26, 1975. Petitioners' establishment was a police problem in that the Napa County Sheriff's Department received and responded to numerous calls concerning criminal activities at petitioners' business, including knifings, shootings, beatings, disturbance of the peace and sale of intoxicants to minors.

"The Department of Alcoholic Beverage Control received several complaints regarding said operation and issued several warning letters to petitioners. In November 1973, Department of Alcoholic Beverage Control representatives met with petitioners, the Yountville City Council and local citizens concerning numerous complaints against said operation. The criminal activities found herein continued during 1974.

"The Department of Alcoholic Beverage Control has 4 investigators in the Napa, Sonoma, Marin, Lake and Mendocino County area assigned to investigate liquor law violations.

"V

"The Calistoga Police Department consists in 6 officers and a Chief of Police. Only 2 officers are on duty during any one 8 hour shift. The number of police calls and responses, in relation to the size of the police force, has created a general police problem. A substantial amount of police work is devoted to problems associated with the consumption of alcoholic beverages. The police department made 112 responses to licensed premises during the period December 1, 1973-November 30, 1974. An additional licensed premises would tend to aggravate the present police problem.

"VI

"Petitioners since February 2, 1975 have operated a restaurant at the premises, specializing in Mexican food. Petitioners propose to serve beer in connection with their restaurant business. Proposed hours of operation are 11:00 a.m. to 11:00 p.m., with additional hours if warranted by business.

"VII

"There are more premises licensed within the Calistoga area than are necessary to satisfy the public demand of those who normally patronize the area. Public convenience or necessity will not be served by issuance of the license."

Testifying on behalf of the department, Special Investigator Anthony B. Scurachio stated that an on-sale general license was held at the proposed premises from approximately 1939 to 1973; it is located in a commercial

area; there are currently 18 licensed premises within the City of Calistoga, which has a population of 2,200 persons; most of the licensed premises are located within one city block of the proposed premises; the proposed premises is a restaurant, serving Mexican food; he recommended denial of appellants' application for a license based on the protests of the Chief of Police and the City Council of Calistoga that there was an undue concentration of licenses in the area; he did not take into consideration the issue that granting of the license would create a police problem (R.T. 21, 30); the witness further stated that, in his opinion, the issuance of an additional license in this city would constitute undue concentration because:

> "A I determined that the city of Calistoga, that one licensee in roughly five—five of them being—six of them being on-sale general licenses within a downtown area, and there was five—five on-sale beer licenses in town, and two on-sale beer licenses, also. And in view of this I would say that it would be undue concentration in a small area such as the city of Calistoga." (R.T. 22:24-23:2.)

The witness also stated that the present application was filed on September 5, 1974; he contacted the Chief of Police on September 5 to advise him that a new protest would have to be submitted; since a supplemental application had been filed, the prior protest would not remain in effect. (R.T. 14-41.)

A diagram of the area was received in evidence as department's exhibit 1.

Stanley J. Pierce, district administrator, Department of Alcoholic Beverage Control, testified that the applicants held an on-sale beer license in Yountville since 1971. Due to complaints concerning operation of the premises (re noise and incidents involving patrons) a meeting was held in November 1973 at the request of the Yountville City Council; at the meeting, the Sheriff stated he did not feel appellants' licensed premises in Yountville created a police problem for the Sheriff's Office. In addition, the department had also conducted an investigation pertaining to an alleged sale to two minors and an incident which involved a patron firing some shots outside the establishment, but which did not injure anyone; no accusations have ever been filed against the applicants; however, they were notified to keep a closer tab on their patrons.

The witness further stated that when the department was established in 1955, the basis for determining whether an over-concentration of licenses existed in an area was as follows:

> "Q [A] Well, it was established through the police statistics and hearings in these areas where there was large concentration of licenses that there was a high crime rate, and that these crime rates were directly involved in premises that were dispensing alcoholic beverages.
>
> "Q What type of crimes?
>
> "A Crimes involving prostitution, drunkenness, muggings, robberies, B-girl activities, other gambling activities. In some cases involved sales of drugs in licensed premises." (R.T. 45:25-46:5.)

With respect to making a determination whether the proposed premises in Calistoga would result in an undue concentration of licenses, he checked crime statistics furnished by the local police department; he did not find a high crime rate related to alcohol in Calistoga; but, it is not necessary to consider these factors when you have eighteen licensed premises in a city that has a population of 2,200 people, particularly when the city has a limited amount of police power; this, in itself, would constitute an over-concentration of licenses; as to existing licenses, his finding that issuance of a license to appellants would aggravate an existing police problem was based on the fact that whenever you increase the number of licensed premises, you create additional law enforcement problems regardless of how well the licensed premises is operated; so when the police department has a limited staff, you are going to increase the problems for that agency; the Chief of Police indicated to him that, based on the manpower available (seven men covering 24 hours), he already had a problem enforcing the law in the City of Calistoga; except for a licensed premises known as The White Swan, there have been no complaints, to his knowledge, by the City of Calistoga or the Police Chief that any of said premises were causing a police problem (R.T. 41-67).

James Autry, Chief of Police for the City of Calistoga, testified on behalf of the department that, including himself, there are seven officers on the police force, with no more than two on duty at any one time; he protested instant license because he felt the city had an ample supply of alcoholic beverage licenses and because an additional license would add to the burden of his staff; he did not

have a complete report available as to alcohol-related offenses since persons arrested for drunkenness are not booked but taken directly to a clinic; he believed there were about 55 arrests related to drinking during the past year; from December 1, 1973, to November 30, 1974, the police department made 112 responses to various licensed premises (R.T. 67-84).

William G. Bishop, captain, Napa County Sheriff's Department, called as a witness by the applicants, stated that, from 1970 to date (March 1975), of the nineteen cases pertaining to applicants' former licensed premises at Yountville, nine thereof had been reported by the licensees or in their behalf; these matters relating to disturbing the peace, shooting in an occupied building, assault with a deadly weapon, and loud music (R.T. 84-92).

Barbaro Flores, a co-applicant, testified the proposed premises in Calistoga is a restaurant serving Mexican food, which seats approximately 50 people; no entertainment will be provided at the proposed premises; it will be open from 11 a.m. to about 11 p.m.; his mother and sister-in-law will assist him in operating the premises; the proposed premises is quite different from the licensed premises he formerly had in Yountville, since it is a restaurant instead of a bar serving short orders on weekends only; hence, it should be more orderly; he has lived in the area for ten years and has had no problems with the police; he has called the police whenever people refused to conduct themselves properly at his former licensed premises (R.T. 93-101).

On appeal, appellants contend the Department of Alcoholic Beverage Control exceeded its jurisdiction by hearing protests which were filed after the time limitation provided by Business and Professions Code section 24013. This statute reads, in part, as follows:

> "Protests may be filed at any office of the department at any time within 30 days from the first date of posting the notice of intention to engage in the sale of alcoholic beverages at such premises."

The pertinent chronology of events is as follows:

August 9, 1974—application filed

August 22, 1974 ()—Protest filed by Chief of Police Autry (This letter of protest was not made a part of the record; however, protestants' exhibit I (*infra*) indicates a protest had been filed; department's reply brief (p. 1) states the first protest was filed on or about August 22, 1974.)

August 30, 1974—second application filed (initial application deemed faulty)

September 5, 1974—second application posted

September 6, 1974—protest filed by Mayor Butler

October 9, 1974—second protest filed by Chief of Police Autry

October 18, 1974—supplemental protest filed by Mayor Butler (This letter, giving specific grounds of protest, indicates it is in response to a letter received from the department, dated October 3, 1974; said letter is not a part of the record before us.)

With respect to the protest of Mayor Butler, his initial protest was clearly filed within thirty days of posting of the notice of intent to engage in the sale of alcoholic beverages, relative to the second application. The department acquired jurisdiction at that time. Apparently, as indicated above, he was subsequently requested by the department to state his specific grounds of protest: this was filed on October 18, 1974. As stated by the department in its reply brief (p. 3), the statute does not set forth the form or content of a protest.

It appears that Chief of Police Autry filed a protest (on or about August 22, 1974), relative to the initial application of August 9, 1974. Not until October 3, 1974, did the department notify him by letter (protestants' exhibit I) that since the initial application had been withdrawn, his protest was moot; that a supplemental application had been filed on September 5, 1974, and that a protest against this application would have to be received within ten days of October 3, 1974. His second protest was received by the department on October 9, 1974. This was four days beyond the 30-day posting period, which expired on October 5, 1974. However, he did file a timely protest relative to the initial application. Secondly, the statute does not seem to preclude the filing of a protest prior to posting of the notice of intent. Thirdly, the department granted him time beyond the 30-day posting period of the second application to refile a protest.

It has been stated that a notice of appeal is to be liberally construed so as to preserve the right of appeal (*Dept. of Alcoholic Bev. Control* v. *Alcoholic Bev. Control*

Appeals Bd. & Hallwell, 169 Cal.App.2d 785 [338 P.2d 50]). We consider this rule as also being applicable to the filing of a protest.

As indicated in the case of *Reimel* v. *Alcoholic Bev. Control Appeals Bd. & Katz & Safeway*, 263 Cal.App.2d 706 [69 Cal. Rptr. 744], cited by appellants, statutes should be interpreted to promote rather than defeat the legislative purpose and policy.

It is our oponion that, under the circumstances, both protests were properly received.

The appeals board finds no merit in appellants' argument that the department exceeded its jurisdiction by violation of articles I and II of the California Constitution and the Fourteenth Amendment of the United States Constitution because it made a determination of undue concentration as to instant application, yet it did not reach a similar conclusion with respect to a license which was subsequently issued in the same vicinity.

We next consider appellants' argument that the department's findings are not supported by substantial evidence.

The department employee who investigated instant application indicated his denial thereof was based on the fact protests had been filed by the Chief of Police and the City of Calistoga. This, alone, would not justify denial. After further questioning, he indicated denial was also based on the fact that a sufficient number of licensed premises already existed in the area.

This board has consistently held that mere numerical existence does not establish undue concentration (see

Torres v. *Dept. of Alcoholic Bev. Control*, 192 Cal.App.2d 541 [13 Cal.Rptr. 531]. Other factors must be involved. In addition to undue concentration, the department determined that issuance of the license would aggravate an existing police problem. However, the department's district administrator stated he did not find a high crime rate related to alcohol in the City of Calistoga; also, that, to his knowledge, except for one licensed premises, there had been no complaints made to the department by the city or the Chief of Police that any of the existing licensed premises were causing a police problem. Both the district administrator and the Chief of Police indicated they were opposed to issuance of the license because, due to the latter's minimal staff, the local police department already had more work than it could handle; thus, it could not assume the burden of an additional licensed premises. We do not consider this, by itself, as constituting a sufficient basis for preventing the opening of a business; neither does this establish "aggravation of an *existing* police problem" as that term is generally understood. There must be evidence that if the applicants were granted a license said premises would aggravate or contribute to a law enforcement problem which already exists in the area. This was not established. It is also noted the proposed premises was previously licensed from 1939 to 1973.

The fact that the proposed premises would create a police problem, based upon the licensees' past history, was not an issue of protest. Even if it were, the evidence relating thereto would not constitute a basis for denial of the license. While certain incidents occurred at the former licensed premises of applicants in Yountville, they involved

patrons, only, and many of the complaints pertaining thereto were reported to local law enforcement officials by the licensees. Furthermore, the local sheriff stated he did not consider the former licensed premises to be a police problem. No accusations were filed against the licensees by the department. As indicated by appellants, the proposed premises should not cause a police problem since it is a restaurant with the sale of beer and wine being incidental to the serving of food, instead of being primarily a bar as was the former licensed premises.

The issues raised by the department and protestants not having been established by substantial evidence, the question of public convenience or necessity, set forth in Business and Professions Code section 23958, becomes moot.

The department's decision, constituting an abuse of discretion, is reversed.

HUGH M. BURNS, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We concur:
Peter M. Finnegan
Eugene V. Lipp

Appendix E

Requested Jury Instructions Refused by the Court:

"A public official is not liable in damages for a mistake in judgment where the mistake is not unreasonable in the light of all the circumstances and the decision was made in good faith. It is the existence of reasonable grounds for the belief formed at that time and in light of all the circumstances, coupled with good-faith belief that renders him not liable. In determining reasonability, the matter is to be judged on the facts as they appeared at the time and not as they subsequently appeared in light of the event." Citing, *Wood v. Strickland* (1975) 420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992, 421 U.S. 921, 43 L.Ed.2d 790, 95 S.Ct. 1589; *Scheuer v. Rhodes* (1974) 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683.

Also requested instruction:

"You are instructed that the plaintiffs have no constitutional right to be free from a public official's honest misunderstanding of the law or facts in performing his duties." Citing *Bowens v. Kanazze* (1965) (D.C. Ill.) 237, FS 826; *Agnew v. City of Compton* (CA 9th, 1956) 239 F.2d 226, cert. den. 353 U.S. 959, 1 L.Ed. 29, 910, 77 Ct. 869, overruled on the grounds; *Cohen v. Norris* (CA 9th), 300 F.2d 24.

Appendix F

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Appendix G

California Constitution, art. 20, § 22:

1. Provides that the state shall have exclusive right to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages as well as the exclusive right to regulate imports into and exports from the state insofar as exercise of such rights does not conflict with rights of the federal government.

2. Provides that alcoholic beverages may be bought, sold, served, consumed and otherwise disposed of in licensed premises, and enumerates the types of premises where alcoholic beverages specified in the license may be sold and served for consumption on the premises.

3. Prohibits the sale, furnishing, giving or causing to be sold, furnished or given away any alcoholic beverage to any persons under the age of 21 years, and prohibits the purchase of alcoholic beverages by such persons.

4. Provides for a Department of Alcoholic Beverage Control, with the Director of Alcoholic Beverage Control as its head, and gives the Department of Alcoholic Beverage Control exclusive power to license manufacture, importation and sale of alcoholic beverages and to deny or revoke the license for good cause.

5. Establishes the Alcholic Beverages Control Appeals Board, provides for review of decisions appealed thereto by persons aggrieved by decisions of the department, provides for the scope of review, and provides for judicial review of orders of the board.

6. Provides that the Alcoholic Beverage Control Act, Stats. 1953, c. 152, p. 955, § 1, as amended, shall govern the privilege of keeping, buying, selling, serving and otherwise disposing of alcoholic beverages or beers until other legislation is enacted.

7. Provides for the assessment and collection of excise taxes by the State Board of Equalization on account of the manufacture, importation and sale of alcoholic beverages.

8. Provides that the legislature may authorize the sale in retail stores of liquor, contained in its original packages, where liquor is not to be consumed on premises where sold, and authorizes the legislature to provide for the issuance of all types of licenses.

9. Provides that the legislature shall apportion license fees or occupation taxes between the state and cities, counties and cities and counties of state as they deem proper.

Appendix H

California Business and Professions Code Section(s):

§ 23000. Short title. This division shall be known and may be cited as the "Alcoholic Beverage Control Act."

§ 23958. Investigation; denial of application, grounds. Upon receipt of an application for a license or for a transfer of a license and the applicable fee, the department shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license and whether the provisions of this division have been complied with, and shall investigate all matters connected therewith which may affect the public welfare and morals. The department shall deny an application for a license or for a transfer of license if either the applicant or the premises for which a license is applied do not qualify for a license under this division.

The department further may deny an application for a license if issuance of such license would tend to create a law enforcement problem, or if issuance would result in or add to an undue concentration of licenses and the applicant fails to show that public convenience or necessity would be served by such issuance.

§ 23988. Protest from local governing body; hearing; procedure; powers of board. Upon receipt by the department within such 30 days of a protest by the governing body of the city or county to whom notice of a license issuance or transfer application has been mailed against the issuance or transfer of a license, the department shall not issue or transfer the license until after a public hearing

is held by the department within the county or city affected. The proceedings shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all the powers granted therein.

§ 24011. Notice; petition for license. Immediately upon the denial of any application for a license, the department shall notify the applicant in writing. Within 10 days after the department mails the notice, the applicant may present his written petition for a license to the department.

§ 24012. Petition; setting for hearing. Upon receipt by the department of a petition for a license in proper form, such petition shall be set for hearing.

§ 24013. Protests; time. Protests may be filed at any office of the department at any time within 30 days from the first date of posting the notice of intention to engage in the sale of alcoholic beverages at such premises.

§ 24014. Protests; verification. A protest made by any person other than an employee of the department or a public officer shall be verified. Verification may be on information and belief.